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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. RONALD FORREST ROSE, Defendant and Appellant.	H037125 (Santa Clara County Super. Ct. No. 210975)

Ronald Forrest Rose appeals from the July 5, 2011 order committing him as a sexually violent predator (SVP) to the custody of the California Department of Mental Health (DMH) for an indeterminate term pursuant to California's Sexual Violent Predator Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.).[1] Appellant contends that the commitment violates due process because the 2009 version of the "standardized assessment protocol" underlying the evaluations leading to his commitment is invalid because it is not "standardized." Appellant further argues, that if this court finds that he forfeited the foregoing contention because his counsel failed to timely object, he was denied effective assistance of counsel. Lastly, he asserts that the indeterminate term of

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

commitment violates the equal protection, ex post facto, double jeopardy, and due process clauses of the federal Constitution.

Appellant does not challenge the sufficiency of the evidence to support the commitment order.

I

Procedural History

A petition to commit appellant as an SVP was filed June 13, 2008. It indicated that, on July 24, 2006, appellant was committed as an SVP to a two-year term as then provided by the SVPA. The June 2008 petition further indicated that the two-year term was retroactively converted to an indeterminate term of commitment by court order in July 2007. Since the legality of the retroactive order had been called into question, the 2008 petition sought a new order committing appellant to an indeterminate term.

By decision filed June 13, 2008, of which we take judicial notice, this court reversed the July 2007 commitment order (*People v. Rose*, H031855). (See Evid. Code, §§ 452, subd. (d), 459, subd. (a).

A probable cause hearing was held. By order filed on November 16, 2009, the court found probable cause to believe that appellant had been convicted of a qualifying sexually violent offense against at least one victim, he had a diagnosable mental disorder, and the disorder made it likely that he will engage in predatory sexually violent conduct if released.

By motion filed August 27, 2010, appellant sought new evaluations, conducted by new and impartial evaluators, based upon a valid "standardized assessment protocol" and a new probable cause hearing pursuant to *In re Ronje* (2009) 179 Cal.App.4th 509 (*Ronje*). *Ronje* had ordered such pretrial relief where evaluations pursuant to section 6601, leading to the filing of an SVPA commitment petition, had been conducted under a standardized assessment protocol determined to be an invalid underground regulation not adopted in compliance with the Administrative Procedure Act (APA) (Gov. Code,

§ 11340 et seq.). (*Ronje*, *supra*, 179 Cal.App.4th at p. 521.) By order filed January 26, 2011, the trial court denied appellant's *Ronje* motion.

Appellant initialed and signed a written waiver of his trial rights and submission of the SVPA petition; the form was filed on July 5, 2011. Also on July 5, 2011, a written waiver of appellant's appearance and submission of the petition, signed by both appellant and his counsel, was filed and accepted by the court. The court stated on the record that appellant was submitting the petition for decision by the trial court. The following People's exhibits were admitted into evidence: the August 2009 evaluation by Laljit Sidhu, Psy.D., a transcript of the July 1, 2009 probable cause hearing testimony of Michael J. Selby, Ph.D., the May 2011 evaluation by Michael J. Selby, Ph.D., and the May 2011 report of Laljit Sidhu, Psy.D.

The trial court found true beyond a reasonable doubt that appellant was an SVP within the meaning of section 6600 and issued the July 5, 2011 commitment order. The order was made "subject to the ultimate decision in [*People v. McKee* (2010) 47 Cal.4th 1172]."

II

Discussion

A. *Standardized Assessment Protocol*

1. *Validity of Protocol Under State Law*

Section 6601, subdivision (c), mandates: "The State Department of Mental Health shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." A pair of

concurring evaluations concluding that the person meets the qualifying criteria is a prerequisite to the filing of an SVPA commitment petition. (§ 6601, subds. (c)-(g); *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 909.)

Appellant asserts that the 2009 protocol promulgated by the DMH, and partly codified in the California Code of Regulations, title 9, section 4005,[2] is invalid as a "standardized assessment protocol" because it fails to "describe the same objective, scientific, empirically-based methodology, so that all evaluators could operate under the same guidelines, using well-defined objectives and criteria."[3] Section 4005 of the regulations, entitled "Evaluator Requirements," provides: "The evaluator, according to his or her professional judgment, shall apply tests or instruments along with other static and dynamic risk factors when making the assessment. Such tests, instruments and risk factors must have gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders and be appropriate to the particular patient and applied on a case-by-case basis. The term 'professional recognition or

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[2] All further references to regulations or Regs. are to the California Code of Regulations, title 9.

[3] A copy of an uncodified, six-page "Standardized Assessment Protocol for Sexually Violent Predator Evaluations," with an "issue date" of February 11, 2009, was attached as an exhibit to appellant's August 2010 motion for *Ronje* relief. The protocol includes the language of section 4005 of the regulations. Both parties refer to that 2009 protocol on appeal and neither suggests that the exhibit is not true and correct or has been superseded. Respondent points to DMH's general recommendations that evaluators should be "knowledgeable and familiar with the literature, studies, and tests or instruments used in the field of evaluation and diagnosis of sex offenders, as well as the latest developments in these areas" and should "obtain, review, and consider all relevant information and records that bear upon the case and be prepared to testify and undergo cross examination regarding these sources of information and how they contributed to the conclusions reached in the evaluation." We note that the protocol directs evaluators to take into account the following risk factors during an evaluation pursuant to section 6601, subdivision (c): (1) criminal history, (2) psychosexual history, (3) type of sexual deviance, (4) degree of sexual deviance, (5) duration of sexual deviance, and (6) severity of mental disorder. These are the same risk factors identified by section 6601, subdivision (c).

acceptance' as used in this section means that the test, instrument or risk factor has undergone peer review by a conference, committee or journal of a professional organization in the fields of psychology or psychiatry, including, but not limited to, the American Psychological Association, the American Psychiatric Association, and the Association for the Treatment of Sexual Abusers."[4] Appellant declares that the 2009 protocol is not "standardized" since it "simply leaves to the discretion of each evaluator which tests and instruments to administer, and which static and dynamic risk factors to consider, or not consider." He contrasts the 2009 protocol with past protocols, stating "[v]ery much *unlike* the predecessor protocols promulgated by the DMH . . . , the six-page 2009 protocol does not contain *any* detailed or uniformed procedures for evaluators to follow when performing SVP evaluations." Appellant insists that his commitment under the invalid protocol violates due process.

Respondent maintains that the 2009 protocol satisfies section 6601, subdivision (c). According to respondent, the protocol achieves "standardization by requiring evaluators to restrict themselves to using tests, instruments, and risk factors that have 'gained professional recognition or acceptance in the field of diagnosing, evaluating or treating sexual offenders' through professional peer review, by notifying evaluators of new developments in the field, and by providing them with informational training." Respondent states that the "DMH has determined that providing a rigid step-by-step procedure is neither feasible nor advisable."[5]

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[4] A new regulatory chapter, entitled "Assessment of Sexually Violent Predators," was adopted in February 2009 on an emergency basis and became permanent in September 2009. (See Regs., §§ 4000, 4005; Register 2009, Nos. 6 and 38.) Section 4000 of the regulations states: "This chapter applies to evaluators performing an assessment to determine whether a person is a sexually violent predator pursuant to Welfare and Institutions Code § 6600 et seq."

[5] The 2009 Standardized Assessment Protocol attached to appellant's August 2010 *Ronje* motion states in part: "This protocol cannot prescribe in detail how the clinician exercises his or her independent professional judgment in the course of performing SVP

"Where a statute empowers an administrative agency to adopt regulations, such regulations 'must be consistent, not in conflict with the statute, and reasonably necessary to effectuate its purpose.' (*Mooney v. Pickett* (1971) 4 Cal.3d 669, 679; Gov. Code, § 11342.2.) The task of the reviewing court in such a case ' "is to decide whether the [agency] reasonably interpreted the legislative mandate." [Citation.]' [Citation.] Such a limited scope of review constitutes no judicial interference with the administrative discretion in that aspect of the rulemaking function which requires a high degree of technical skill and expertise. [Citation.] Correspondingly, there is no agency discretion to promulgate a regulation which is inconsistent with the governing statute." (*Woods v. Superior Court* (1981) 28 Cal.3d 668, 679; see Gov. Code, 11342.2.)[6]

"The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued. [Citations.]" (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4.) When a court reviews an agency's interpretation of a statute, however, the court "accords great weight and respect to the administrative construction." (*Id*. at p. 12.) By adopting the 2009 standardized assessment protocol and section 4005 of the regulations pursuant to section 6001, the DMH impliedly construed the statutory meaning of the word "standardized." "If an agency has adopted an interpretative rule in accordance with Administrative Procedure Act provisions—which include procedures (e.g., notice to the public of the proposed rule

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evaluations. Since the exercise of independent, professional clinical judgment is required, this evaluation protocol is not, and cannot be, a detailed, precise step-by-step procedure like the kind of procedure that might apply to the chemical analysis of an unknown substance."

[6] Government Code section 11342.2, part of the Administrative Procedure Act (Gov. Code, § 11340 et seq.), provides: "Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."

and opportunity for public comment) that enhance the accuracy and reliability of the resulting administrative 'product'—that circumstance weighs in favor of judicial deference." (*Id*. at p. 13.) Appellant makes no claim that the DMH did not comply with the APA when it adopted section 4005.

While the DMH's more detailed and longer "Clinical Evaluator Handbook and Standardized Assessment Protocol," which it had revised over the years before producing the 2009 protocol, indicates that the DMH had previously implemented section 6001 differently, appellant has not cited any legislative history indicating that the Legislature intended any specific degree of standardization. Section 6001 does not expressly define "standardized" and we have no reason to believe that the Legislature was not leaving the degree of standardization to the expertise of the DMH in this area. As the U.S. Supreme Court has recognized, the federal "Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules" and "the science of psychiatry . . . is an ever-advancing science . . . . [Citations.]" (*Kansas v. Crane* (2002) 534 U.S. 407, 413 [122 S.Ct. 867].) The 2009 protocol, as partly codified in section 4005 of the regulations, requires evaluators to conform to peer-reviewed, professional norms in conducting their SVPA evaluations. Appellant has not established that the 2009 protocol, as partly codified in section 4005 of the regulations, provides an inadequate "standard" within the meaning of section 6601 or is inconsistent with the governing statute.

2. *Constitutionality of Commitment Under the 2009 Protocol*

Even if we assume for the sake of argument that the 2009 protocol, as partly codified in section 4005 of the regulations, does not meet the requirements of section 6001, appellant does not persuade us that his commitment as an SVP was unconstitutional. Violations of state law do not necessarily amount to federal constitutional error. "[The U.S. Supreme Court has] long recognized that a 'mere error of state law' is not a denial of due process. [Citation.] If the contrary were true, then 'every

erroneous decision by a state court on state law would come [to this Court] as a federal constitutional question.' [Citations.]" (*Engle v. Isaac* (1982) 456 U.S. 107, 121, fn. 21 [102 S.Ct. 1558].)

Appellant asserts that the evaluator's use of the 2009 protocol was "a *substantive*, not a procedural flaw." We recognize that the substantive component of the federal constitutional right of due process "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' [Citation.]" (*Zinermon v. Burch* (1990) 494 U.S. 113, 125 [110 S.Ct. 975].) "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. [Citation.]" (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80 [112 S.Ct. 1780].) "The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny." (*Reno v. Flores* (1993) 507 U.S. 292, 316 [113 S.Ct. 1439].) While this court is certainly familiar with these due process principles, appellant has not shown that the evaluations conducted under the 2009 protocol resulted in an arbitrary deprivation of his liberty.

Variations in evaluators' professional approaches in diagnosing and evaluating sexual offenders for the purpose of determining whether they qualify as SVP's, within the broad guidelines of the 2009 protocol, do not necessarily result in a commitment that is arbitrary or irrational in contravention of due process. (See *Kansas v. Hendricks* (1997) 521 U.S. 346, 360, fn. 3 [117 S.Ct. 2072] [recognizing that "psychiatric professionals are not in complete harmony in casting pedophilia, or paraphilias in general, as 'mental illnesses[]' " and stating that their "disagreements . . . do not tie the State's hands in setting the bounds of its civil commitment laws" as a matter of substantive due process].) Of course, an individual is free to test the validity of an evaluator's opinion through the procedural safeguards available at trial.

Ultimately in SVPA proceedings, the trier of fact must decide whether the person meets the legal definition of an SVP. Appellant raises no argument that the legal

definition of an SVP does not satisfy substantive due process requirements for civil commitment. (See *Hubbart v. Superior Court* (1999) 19 Cal.4th 1138, 1151-1167 [rejecting due process challenges to SVPA]; see *People v. Hubbart* (2001) 88 Cal.App.4th 1202, 1226 [SVPA's definition of the term "diagnosed mental disorder" satisfies due process]; see also *Kansas v. Crane*, *supra*, 534 U.S. at p. 413 [to civilly commit a person, "there must be proof of serious difficulty in controlling behavior" but "the States retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment"]; *Kansas v. Hendricks*, *supra*, 521 U.S. at pp. 356-360 [Kansas Sexually Violent Predator Act's definition of "mental abnormality" satisfied substantive due process requirements for civil commitment]; *People v. Williams* (2003) 31 Cal.4th 757, 777 [holding that "a commitment rendered under the plain language of the SVPA necessarily encompasses a determination of serious difficulty in controlling one's criminal sexual violence, as required by *Kansas v. Crane*"].) Following trial, the trial court found that appellant was an SVP as legally defined. The California Supreme Court has determined that an indeterminate term of commitment imposed pursuant to the SVPA does not violate substantive due process since, under the SVPA, an individual is not subject to civil commitment as an SVP when the individual no longer meets the requisites of such commitment. (*People v. McKee*, *supra*, 47 Cal.4th at pp. 1188-1193 (*McKee*).) Appellant has failed to demonstrate that evaluations under the 2009 protocol resulted in a commitment order violating substantive due process.

Appellant has not shown that the evaluators' reliance upon the 2009 protocol violated procedural due process either. "In procedural due process claims, the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. [Citations.]" (*Zinermon v. Burch*, *supra*, 494 U.S. at pp. 125-126, fn. omitted.) But due process does not safeguard "the

meticulous observance of state procedural prescriptions . . . ." (*Rivera v. Illinois* (2009) 556 U.S. 148, 158 [129 S.Ct. 1446] ["Because peremptory challenges are within the States' province to grant or withhold, the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal Constitution"].)

" '(D)ue process is flexible and calls for such procedural protections as the particular situation demands.' *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)." (*Mathews v. Eldridge* (1976) 424 U.S. 319, 334 [96 S.Ct. 893].) "[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.]" (*Id*. at p. 335.) Appellant has made no argument that the "specific dictates of due process" require the procedural safeguard of an administrative protocol providing greater standardization. Neither has he established that the use of the allegedly invalid 2009 protocol resulted in a commitment process involving "such a probability that prejudice will result that it is deemed inherently lacking in due process." (*Estes v. State of Tex.* (1965) 381 U.S. 532, 542-543 [85 S.Ct. 1628].)

3. *No Showing of Prejudice*

Moreover, even if evaluation of appellant under the 2009 protocol was error because the protocol was not "standardized" within the meaning of section 6001, it was state law error. Well-established principles of appellate review of state law error preclude reversal for harmless error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); Cal. Const., art. VI, § 13; cf. also *Ronje, supra*, 179 Cal.App.4th at pp. 517-518 [*Pompa-Ortiz* rule applicable to judicial review of irregularities in preliminary hearing procedures also applies to judicial review of evaluators' use of an invalid "standardized

assessment protocol" in SVP proceedings]; *People v. Pompa–Ortiz* (1980) 27 Cal.3d 519, 529 [after trial, "irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination"].)

Appellant contends: "[T]he errors in relying on the flawed 2009 DMH protocol were not superseded by evidence presented at a trial. The trial court rested its decision here, in significant part, upon the evaluations written by Dr. Selby . . . and the evaluations written by Dr. Sidh[u] . . . ," which he states were based on the invalid protocol. He further argues: "[T]he error in using the 2009 DMH protocol was not harmless because those faulty evaluations served as the basis for the trial court's decision in this case. The flawed 2009 protocol tainted the evaluations, which in turn tainted the outcome in this case." These arguments do not demonstrate prejudice.

"[A] 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Watson*, *supra*, 46 Cal.2d at p. 836.) The test of prejudice under *Watson* "must necessarily be based upon reasonable probabilities rather than upon mere possibilities . . . ." (*Id.* at p. 837.) A reasonable probability is more than a "mere *theoretical* possibility" (*People v. Blakeley* (2000) 23 Cal.4th 82, 94) or an "abstract possibility" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715).

The record does not establish that there is a reasonable probability that appellant would not have been found to be an SVP had he been evaluated under a standardized assessment protocol that satisfied his definition of "standardized." Appellant has not challenged the sufficiency of the evidence proving that he is an SVP; he presented no evidence at trial. In addition, the record does not show that use of the 2009 protocol

resulted in the application of an incorrect or incomplete legal standard by the professional evaluators or the court. (Cf. *People v. Superior Court* (*Ghilotti*), *supra*, 27 Cal.4th at p. 913 [the legal error of a concurring evaluator who concluded that a person was an SVP cannot be deemed material unless there is "a reasonable probability, sufficient to undermine confidence in the outcome, that the error affected the evaluator's ultimate conclusion" and "a change in the evaluator's conclusion would . . . dissolve . . . the necessary concurrence . . ." supporting the filing of the SVP petition]; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1192-1194 [trial court erred in failing to instruct the jury on the need to find a likelihood of future predatory acts but error was harmless beyond a reasonable doubt under *Chapman* standard].) Appellant is not arguing, and has not shown, that the use of the 2009 protocol caused the court to use a constitutionally inadequate standard of proof. (See *Addington v. Texas* (1979) 441 U.S. 418, 432-433 [99 S.Ct. 1804] [in civil commitment proceedings, due process requires at least a "clear and convincing" standard of proof].) In sum, even assuming for the sake of argument that the 2009 protocol is invalid under state law, no prejudice has been demonstrated.

4. *Ineffective Assistance*

Appellant argues that, if this court finds he forfeited the contention that his commitment was based on an invalid protocol by failing to object to the 2009 protocol on the grounds now raised, he was denied his Sixth Amendment right to effective counsel. It is unnecessary to reach this contention since we have not applied any forfeiture rule. In any case, the contention is meritless.

"[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . . ." (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690 [104 S.Ct. 2052].) "When, as here, defense counsel's reasons for conducting the defense case in a particular way are not readily apparent from the record, we will not assume inadequacy of representation unless there could have been

' "no conceivable tactical purpose" ' for counsel's actions. [Citations.]" (*People v. Earp* (1999) 20 Cal.4th 826, 896.)

B. Constitutional Claims

1. *Equal Protection*

Citing *McKee, supra,* 47 Cal.4th 1172, appellant argues that his indeterminate commitment as an SVP violates his right to equal protection. He urges this court to reverse and remand the case to the trial court for consideration of his equal protection claim in light of *McKee*. In *McKee*, the California Supreme Court recognized that persons civilly committed as mentally disordered offenders (MDO's) or after being found not guilty by reason of insanity (NGI's) are subject to a short, definite term of commitment whereas persons found to be SVP's are committed to an indeterminate term of commitment. (*Id*. at pp. 1202, 1207.) It concluded that SVP's were similarly situated to both those groups of committees. (*Id*. at pp. 1204, 1207.) The court made clear that where groups are similarly situated and "the state makes the terms of commitment or recommitment substantially less favorable for one group than the other, . . . it is required to give some justification for this differential treatment." (*Id*. at p. 1203.)

The Supreme Court in *McKee* found that "the People have not yet carried their burden of justifying the differences between the SVP and [the other] commitment statutes" but "neither the People nor the courts below properly understood" the People's burden of justifying the differential treatment of SVP's. (*Id.* at pp. 1207-1208.) The court remanded the matter to the trial court "to determine whether the People, applying the equal protection principles articulated in [*In re Moye* (1978) 22 Cal.3d 457] and related cases discussed in the [*McKee*] opinion, can demonstrate the constitutional

justification for imposing on SVP's a greater burden than is imposed on MDO's and NGI's in order to obtain release from commitment."[7] (*Id*. at pp. 1208-1209, fn. omitted.)

We will reverse and remand for consideration of appellant's equal protection claim in accordance with *McKee*. Consistent with the Supreme Court's expressed desire to avoid an unnecessary multiplicity of proceedings on this issue, we will direct the superior court to suspend further proceedings on that claim pending finality of the proceedings on remand in *McKee*.[8] (Cf. *People v. Kisling* (2011) 199 Cal.App.4th 687, 695.)

2. *Other Constitutional Challenges*

For purposes of further review, appellant challenges the indeterminate term of commitment on the ground that it violates the ex post facto, double jeopardy, and due process clauses of the federal Constitution. He recognizes the California Supreme Court already rejected such ex post facto and due process challenges in *McKee* (see *McKee*, *supra*, 47 Cal.4th at pp. 1188-1195) and this court is bound by *McKee* under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455–456.

As to the double jeopardy claim, a judicial determination that a law is not punitive "removes an essential prerequisite" for such claim. (*Kansas v. Hendricks, supra,* 521 U.S. at p. 370.) In the context of resolving an ex post facto challenge, the high court in

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[7] Superior court proceedings on remand in the *McKee* case were completed, the matter was appealed, and the California Court of Appeal, Fourth District, Division One, filed its opinion on July 24, 2012 (D059843).

[8] We are aware that the Supreme Court, after deciding *McKee*, has transferred cases back to the Courts of Appeal for reconsideration in light of that decision once proceedings on remand in *McKee* are final. We take judicial notice that in *People v. Rotroff*, H033527 (rev. granted Jan. 13, 2010, S178455, transferred with directions May 20, 2010), for example, the Supreme Court ordered in part: "In order to avoid an unnecessary multiplicity of proceedings, the court is additionally directed to suspend further proceedings pending finality of the proceedings on remand in *McKee* (see *McKee, supra*, 47 Cal.4th at pp. 1208-1210), including any proceeding in the Superior Court of San Diego County in which *McKee* may be consolidated with related matters. 'Finality of the proceedings' shall include the finality of any subsequent appeal and any proceedings in this court." (See Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

McKee concluded the SVPA, as amended to provide for an indeterminate term of commitment, is not punitive. (*McKee, supra*, 47 Cal.4th at pp. 1193-1195.) Since SVPA commitment proceedings do not constitute a second criminal prosecution and the act is not punitive, appellant's double jeopardy contention must be rejected. (See *People v. Taylor* (2009) 174 Cal.App.4th 920, 936-937.)

DISPOSITION

The July 5, 2011 order of commitment is reversed for only the narrow purpose of considering appellant's equal protection challenge to his indeterminate SVP commitment in light of *McKee* (*McKee, supra*, 47 Cal.4th 1172). In order to avoid an unnecessary multiplicity of proceedings, the superior court is directed to suspend further proceedings on that claim pending finality of the proceedings on remand in *McKee*. "Finality of the proceedings" shall include the finality of the appeal in *McKee* and any proceedings in the California Supreme Court in *McKee*.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.